

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RALPH GAUSVIK,

Plaintiff,

vs.

ROBERT RICARDO PEREZ,  
individually, and in his  
official capacity; et al.,

Defendants.

No. CV-01-071-AAM

**ORDER GRANTING  
MOTION FOR RECONSIDERATION,  
IN PART**

**BEFORE THE COURT** is the plaintiff's Motion For Reconsideration And/Or  
Alternatively For An Award Of Attorney's Fees Under RCW 4.84. Et Seq. And RCW 4.24.510  
(Ct. Rec. 305).

**I. BACKGROUND**

On May 2, 2005, this court entered an order granting plaintiff's motion for summary  
judgment and awarded judgment to the plaintiff on defendant's state law malicious prosecution  
counterclaim. (Ct. Rec. 303). This court found that because of Judge Whaley's decision in  
*Hidalgo v. Perez*, affirmed by the Ninth Circuit, defendant Badgley was collaterally estopped  
from pursuing his malicious prosecution counterclaim against plaintiff Gausvik. In the order,  
this court also ruled that plaintiff was not entitled to attorney's fees under either RCW 4.24.510  
or RCW 4.84.250.

**ORDER GRANTING MOTION  
FOR RECONSIDERATION, IN PART- 1**

1 Plaintiff now asks the court to reconsider denial of those fees. Although plaintiff's  
2 motion for summary judgment, his reply filed in connection therewith, and his response filed in  
3 connection with defendant's cross-motion for summary judgment, requested fees pursuant to  
4 RCW 4.24.510 and RCW 4.84.250, plaintiff says it was not his intention that this court rule on  
5 said fees. Plaintiff says that assuming summary judgment was awarded in his favor, it was his  
6 intention to file a separate motion for fees. Plaintiff asserts this court "clearly erred" in failing to  
7 award him fees pursuant to either RCW 4.24.510 or RCW 4.84.250.

## 8 9 **II. DISCUSSION**

### 10 **A. RCW 4.24.510**

11 In its order on summary judgment, this court stated:

12 Hidalgo did not prevail upon the defense provided for in  
13 RCW 4.24.510, nor has Gausvik who is getting the benefit  
14 of the decision in *Hidalgo* awarding summary judgment  
against Badgley on his malicious prosecution counterclaim.

15 Plaintiff Gausvik assumes that because of *Hidalgo*, this court collaterally estopped him  
16 from pursuing attorney's fees under RCW 4.24.510. That is not the case. If Hidalgo had been  
17 awarded attorney's fees against Badgley pursuant to RCW 4.24.510, Badgley would have been  
18 collaterally estopped from arguing against an award of such fees to plaintiff Gausvik in the  
19 captioned litigation. As Gausvik points out, Judge Whaley did not consider RCW 4.24.510.  
20 Judge Whaley did not award summary judgment to Hidalgo based on the immunity defense  
21 provided for in RCW 4.24.510. He awarded summary judgment to Hidalgo because he found as  
22 a matter of law pursuant to RCW 4.24.350, that Hidalgo had probable cause to bring his suit  
23 against Badgley and there was no malice involved in bringing the suit.

24 Gausvik did not prevail in the captioned litigation because of the immunity defense  
25 provided for in RCW 4.24.510. He prevailed simply because he received the benefit of Judge  
26 Whaley's decision that, as a matter of law, Badgley did not have a malicious prosecution  
27 counterclaim against Hidalgo pursuant to RCW 4.24.350. In its summary judgment order, this  
28

**ORDER GRANTING MOTION  
FOR RECONSIDERATION, IN PART- 2**

1 court did not analyze the merits of Gausvik's asserted RCW 4.24.510 defense because it did not  
2 need to do so. Gausvik sought summary judgment on a number of alternative grounds, including  
3 RCW 4.24.510 and collateral estoppel. The application of collateral estoppel made it  
4 unnecessary to consider RCW 4.24.510. Gausvik prevailed pursuant to RCW 4.24.350 by virtue  
5 of Judge Whaley's decision in *Hidalgo*.

6 The court will not reconsider awarding fees under RCW 4.24.510.

7 **B. RCW 4.84.250**

8 While RCW 4.24.510 provides for a specific substantive defense from civil liability and  
9 fees for prevailing upon that defense, RCW 4.84.250 is a general fee statute which allows a  
10 prevailing party, "in any action for damages" where the amount sought is \$10,000 or less to  
11 recover a reasonable amount of attorney's fees "as part of the costs of the action."

12 RCW 4.84.270 provides:

13 The defendant, **or party resisting relief**, shall be deemed the  
14 prevailing party within the meaning of RCW 4.84.250, if the  
15 plaintiff, **or party seeking relief in an action for damages** where  
the amount pleaded, exclusive of costs, is equal to or less than  
the maximum allowed under RCW 4.84.250, **recovers nothing**

16 . . . .

(Emphasis added).

17 Here, plaintiff Gausvik was the "party resisting relief" and defendant Badgley was the  
18 "party seeking relief" who ended up recovering nothing because of the application of collateral  
19 estoppel. When the "party seeking relief" seeks less than \$10,000 in damages and recovers  
20 nothing, the "party resisting relief" is entitled to attorney's fees, regardless of whether an offer of  
21 settlement has been made by either party. *Public Utilities District No. 1 Of Grays Harbor v.*  
22 *Crea*, 88 Wn.App. 390, 393, 945 P.2d 722 (1997). The party from whom fees are sought,  
23 however, must have received notice that it may be subject to fees under the statute. *Id.* at 394.  
24 In a letter dated February 15, 2005, sent from plaintiff's counsel by fax and first class mail,  
25 defendant Badgley's counsel was advised that plaintiff intended to pursue fees and costs  
26 pursuant to RCW 4.84.250. (Ex. 1 to Firkins Declaration, Ct. Rec. 306).

27  
28 **ORDER GRANTING MOTION  
FOR RECONSIDERATION, IN PART- 3**

1 Badgley asserts RCW 4.84.250 does not apply because his claim under RCW 4.24.350  
 2 exceeded \$10,000. Badgley says that in addition to liquidated damages of \$1,000, he also sought  
 3 recovery of attorney's fees in the approximate sum of \$34,000 and therefore, the total sum of his  
 4 claim was in excess of \$35,000.<sup>1</sup> Based on *Mackey v. American Fashion Institute Corp.*, 60  
 5 Wn.App. 426, 804 P.2d 642 (1991), this court must disagree. In *Mackey*, the defendant sought  
 6 attorney's fees under RCW 4.84.250. The plaintiff contended RCW 4.84.250 did not apply  
 7 because the "amount pleaded" exceeded \$10,000. In his complaint, plaintiff prayed for relief in  
 8 "the amount of \$10,000, together with . . . reasonable attorney's fees and costs and for such other  
 9 and further relief as the court deems just." Plaintiff contended his request for an unspecified  
 10 amount of attorney's fees had to be treated as a damage element. The Washington Court of  
 11 Appeals disagreed:

12 Mackey brought suit under RCW 49.52.070, which allows  
 13 for judgment for twice the amount of wages withheld by way  
 14 of exemplary damages, *together with* costs and attorney's fees.  
 15 Mackey has cited no authority, nor are we aware of any, which  
 16 characterizes an attorney's fee award under the statute as an  
 17 element of damages. When a contract, statute or equitable  
 18 basis authorizes the award, attorney's fees are allowed as a part  
 19 of the *cost* of the litigation. [Citations omitted]. Attorney's fees  
 20 are recoverable as a damage element only in a narrow range of  
 21 circumstances, none of which are present here. [Citations omitted].  
 22 The "amount pleaded" under RCW 4.84.250 includes only a  
 23 party's basic claim for damages. [Citation omitted]. Because the  
 24 attorney's fees sought by Mackey cannot be characterized as a  
 25 damage element, they also cannot be considered a part of his  
 26 "amount pleaded" under the statute. Mackey's claim for damages  
 27 thus totaled \$10,000 and was within the limits of RCW 4.84.250.

28 *Id.* at 431-32 (emphasis in original).

Here, defendant Badgley's counterclaim sought an unspecified amount of attorney's fees,  
 in addition to \$1,000 in liquidated damages (Ct. Rec. 13). And like RCW 49.52.070, RCW  
 4.24.350(2) allows for liquidated damages, "together with a reasonable attorneys' fee, and other

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<sup>1</sup> RCW 4.24.350(2) provides that a "law enforcement officer prevailing in such an action  
 may be allowed an amount up to \$1,000 as liquidated damages, together with a reasonable  
 attorney's fees, and other costs of suit."

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 FOR RECONSIDERATION, IN PART- 4**

1 costs of suit.” Therefore, based on *Mackey*, this court concludes the amount of damages sought  
2 by Badgley in his counterclaim was \$1,000 and therefore, RCW 4.84.250 applies. Badgley  
3 argues the attorney’s fees sought by him were not statutory attorney’s fees, but actual attorney’s  
4 fees, and therefore, not “costs” of the litigation as defined in RCW 4.84.010. The court is not  
5 persuaded. Badgley’s counterclaim sought attorney’s fees pursuant to statute, two statutes to be  
6 precise (RCW 4.24.350(2) and RCW 4.84.185).

7 Having concluded that plaintiff is entitled to an award of attorney’s fees pursuant to  
8 RCW 4.84.250, it is now necessary to determine what is a “reasonable” amount of fees. Because  
9 this court initially denied fees altogether and the court has now reconsidered that decision, it is  
10 appropriate to give defendant an opportunity to comment upon the reasonableness of the fee  
11 sought (including hourly rate and number of hours). Within ten (10) calendar days of the date of  
12 this order, defendant shall serve and file a memorandum addressing the aforementioned. Within  
13 ten (10) calendar days thereafter, plaintiff shall serve and file any reply. Thereafter the court will  
14 make a determination regarding a “reasonable” amount of fees.

### 15 16 **III. CONCLUSION**

17 Plaintiff’s Motion For Reconsideration (Ct. Rec. 305) is **GRANTED** to the extent that  
18 plaintiff is entitled to an award of attorney’s fees pursuant to RCW 4.84.250.

19 **IT IS SO ORDERED.** The District Executive shall enter this order and forward copies  
20 of the same to counsel.

21 **DATED** this 7<sup>th</sup> of June, 2005.

22  
23 s/ Alan A. McDonald  
24 ALAN A. McDONALD  
25 Senior United States District Judge  
26  
27  
28

**ORDER GRANTING MOTION  
FOR RECONSIDERATION, IN PART- 5**